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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 614

SETTIMO ACCARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 238-239) is reported at 208 F. 2d 632. The opinion of the District Court (R. 9-18) is reported at 113 F. Supp. 783.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1953 (R. 239). The petition for a writ of certiorari was filed on March 2, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a certificate of naturalization was properly set aside on grounds of fraud and illegal procurement where the applicant did not reveal to the immigration authorities arrests and convictions prior to and during the naturalization proceedings.

STATUTES INVOLVED

Section 307(a) of the Nationality Act of 1940, 54 Stat. 1137, (8 U.S.C. 707a) provides as follows:

> No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Section 311 of the Nationality Act of 1940 (8 U.S.C. 711) provides as follows:

> A person who upon the effective date of this section is married to or thereafter marries a citizen of the United States, or whose spouse is naturalized after the effective date of this section, if such person shall have resided in the

United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, may be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws with the following exceptions:

(a) No declaration of intention shall be required.

(b) The petitioner shall have resided continuously in the United States for at least two years immediately preceding the filing of the petition in lieu of the five-year period of residence within the United States and the six months' period of residence within the State where the naturalization court is held.

Section 338 (a) of the Nationality Act of 1940 (8 U.S.C. 738 (a)) provides as follows:

It shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of nautralization were illegally procured.

STATEMENT

Petitioner was admitted to United States citizenship by a decree entered by the United States District Court for the District of New Jersey on or about January 22, 1945 (R. 2). On November 3, 1952, a complaint was filed in that court by the Government, alleging that such citizenship had been illegally and fraudulently procured and praying that the decree of naturalization be set aside (R. 1-6). The District Court entered a judgment setting aside the 1945 decree making petitioner a citizen (R. 19), for reasons fully set forth in a lengthy opinion (R. 9-18; 113 F. Supp. 783). The Court of Appeals affirmed *per curiam,* adopting the opinion of the District Judge (R. 238-239).

In the complaint, two principal grounds were alleged by the Government: (1) that petitioner's naturalization had been procured by fraud in that in applying for naturalization he had concealed a number of prior arrests and convictions; and (2) that petitioner's naturalization was illegal in that he was not a person of good moral character during the requisite period preceding his naturalization,[1] by virtue of having made false statements under oath in the naturalization proceedings and engaging in the operation of an illicit still during a period ending just three weeks before the decree of naturalization was issued (R. 3-5).

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[1] As the alien spouse of an American citizen applying for citizenship, petitioner must have resided in the United States continuously for two years prior to filing the petition for naturalization, and during that period must have been a person of good moral character (Secs. 307(a) (2), 311, 8 U.S.C. 707 (a) (2), 711).

The facts found by both the District Court and the Court of Appeals to support the allegations of the complaint are as follow:

Petitioner filed an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization (introduced as Ex. G-1, R. 30; see R. 183-185). Question #30 of this Form asked: "Have you ever been arrested or charged with violation of any law of the United States or state or any city ordinance or traffic regulation? If so, give full particulars." (R. 184.) In response thereto petitioner stated: "Arrested and convicted for conspiracy and sentenced to 2 years susp. sentence and 3 years probation $1,000 fine. Also for narcotic violation" (*ibid.*).

Thereafter, on January 25, 1944, when petitioner appeared in order to file a Petition for Naturalization, he failed to disclose any other arrests or convictions, although given ample opportunity to do so. Thus, the naturalization examiner who examined him at that time testified at the denaturalization proceeding that he had questioned petitioner concerning the criminal record revealed by his answer to Question #30, and, in addition, as was his practice, asked whether there were other arrests or convictions (R. 47, 54-55). While petitioner contributed additional information regarding the offenses already revealed (R. 51), he did not then disclose any other arrests or convictions (R. 55). This is confirmed by the Petition for Naturalization where in the space reserved for "arrests, offenses, etc.," in the naturalization examiner's

handwriting, are set forth only the two violations already admitted. (Ex. G-2, introduced in evidence at R. 32; see R. 187, 55-58.)

No other offenses were admitted by petitioner when, on the same day, he was examined by the designated examiner in his case. This examiner testified at the denaturalization proceeding that he re-examined petitioner on the matters previously checked by the naturalization examiner (R. 87, 92, 97), that he had questioned petitioner as to his arrest record (R. 96) and that no arrests in addition to those previously disclosed had been revealed (R. 94-96).

This witness also testified that on January 22, 1945, the day on which petitioner was admitted to citizenship, after being sworn to tell the truth, petitioner had been asked the standard question whether, since filing his petition for naturalization, he had been arrested (R. 113-114). He stated that petitioner had not admitted such an arrest, and that if he had he would not have been granted citizenship on that day, as, in fact, he was (R. 115-116).

At the trial, the Government introduced evidence of three arrests, two of which were followed by convictions, which had never been acknowledged by petitioner, either in the naturalization forms or before the examiners. These were:

(1) On June 8, 1930, he was arrested in Irvington, New Jersey, as a disorderly person. He was found guilty and fined $25.00. (Ex. G-4, introduced in evidence, R. 42; see R. 191-193.)

(2) On July 12, 1933, he was arrested in Jersey

City, New Jersey, under the name of Giuseppi Accarobi, as a disorderly person. He was found guilty and received a suspended sentence. (Ex. G-5, introduced in evidence R. 43; see R. 194-198.)

(3) On October 25, 1944, he was arrested on an indictment charging that from January 1, 1943, to September 30, 1943, he had conspired with other persons to defraud the United States of revenue through the operation of an unregistered still (Ex. G-7, introduced in evidence R. 45; see R. 203-207). This indictment was returned on October 25, 1944 (R. 207), during the interval between the filing of the Petition for Naturalization and petitioner's admission to citizenship.[2] The indictment was finally dismissed on July 7, 1945 (R. 4), some six months after he had obtained his certificate of naturalization.

The trial court found that petitioner's failure to disclose the above arrests and convictions constituted fraud in the procurement of petitioner's naturalization (R. 13). The Court found also that these convictions, together with a later conviction on June 1, 1951, of conspiring to operate an unregistered still from February 1, 1943, to January 5, 1944,[3] demonstrated a lack of good moral character which is a prerequisite to becoming a naturalized

[2] A fourth conviction in 1940 for failing to keep accurate records of wages and hours of his employees, although undisclosed by petitioner, was discovered by the naturalization authorities on their own initiative (Ex. G-6, introduced in evidence R. 44; see R. 199-202). The trial court did not rely on this as a basis for its finding of fraudulent procurement (R. 10).

[3] The record of this conviction is contained in Ex. G-8, introduced in evidence at R. 46; see R. 209-223.

citizen and hence that citizenship had been illegally procured (R. 15).

ARGUMENT

1. Contrary to petitioner's contention, fraud in the procurement of naturalization was proved by clear and convincing evidence. If there were no other facts in this case, that allegation was sufficiently proved by the evidence that petitioner before his naturalization in January 1945, did not reveal that, between the time of his petition for naturalization and his appearance in court, he had been arrested, indicted, and released on bail for the offense of operating an unregistered still. There is no doubt on this record that petitioner was questioned about arrests during the intervening period. Not only did the examiner testify that it was the invariable practice to ask about intervening arrests as one of three standard questions (R. 114), but petitioner, when he took the stand, did not deny that he had been asked such question. He merely offered, as an explanation for his failure to make disclosure, that he thought the indictment had been dismissed (R. 158, 179-181). And considering the fact that the indictment was not in fact dismissed until six months after naturalization, the court had the right to disbelieve petitioner's explanation of his failure to make disclosure in answer to such question (See R. 11). It is also clear, both from the testimony of the examiner (R. 115) and from the nature of the facts themselves, that, had petitioner revealed that he was then under indictment for the offense charged, he would not have been

naturalized on January 25, 1945. Thus, there was clear proof that petitioner's naturalization had been procured by fraud. *United States* v. *Palmeri,* 52 F. Supp. 226 (E. D. N.Y.); cf. *United States* v. *Marafioti,* 43 F. Supp. 215 (S. D. N. Y.).

Petitioner's concealment of his earlier arrests and convictions adds further weight to the proof of fraud. As the trial judge pointed out (R. 13), "the Naturalization court had before it, not a man who had had but a single conviction, and another arrest, as it supposed, but a man who had frequently been in trouble with the authorities over the course of some fifteen years prior to the time of his naturalization. * * * That defendant's wilful failure to disclose this situation to the authorities had a material effect upon the action of the Naturalization officials and the Court in its decision to grant the decree, is undoubted. Particularly is this the case, since even the limited disclosures of the defendant were not passed on by the immigration officials, even tentatively, but referred to the Court for its own decision thereon." The question is not whether conviction for a crime before the statutory period for good moral character would have barred naturalization; the significant fact is that in totality petitioner presented to the naturalization examiner and the court a picture that was willfully and materially false.

The type of fraud here proved is ground for denaturalization, whether it be denominated intrinsic or extrinsic. As this Court said in *Knauer* v. *United States,* 328 U.S. 654, 671-673:

> * * * [W]e need not consider in this case what the historic powers of equity might be in this situation. For Congress has provided that fraud is a basis for cancellation of certificates of naturalization in proceedings instituted by the United States. The legislative history of that enactment shows that false swearing was one of the evils included in the statutory grounds for denaturalization. That power was granted to give added protection against fraud committed on the naturalization courts. * * * *Though the making of a false oath be called intrinsic fraud* (see *United States* v. *Throckmorton,* [98 U.S. 61], *it is within the reach of the statute.* [Emphasis supplied.]

See also *United States* v. *Ness,* 245 U.S. 319, 325; *United States* v. *Siegel,* 152 F. 2d 614 (C.A. 2), certiorari denied, 328 U.S. 868. The fraud in concealing the arrest immediately prior to naturalization is particularly analagous to the fraud in the oath of allegiance involved in *Knauer* for here, as in that case, there was no real opportunity for the naturalization authorities or the court to examine into the fraud. Lower federal courts have consistently held that the concealment of arrests, convictions, and the like is adequate ground for denaturalization for fraud. *Brenci* v. *United States,* 175 F. 2d 90 (C.A. 1); *United States* v. *Ascher,* 147 F. 2d 544 (C.A. 2), certiorari denied, 325 U.S. 884; *United States* v. *DeFrancis,* 50 F. 2d 497 (C.A. D.C.); *United States* v. *Saracino,* 43 F. 2d 76 (C.A. 3); *United States* v. *Etheridge,* 41 F. 2d 762

(D. Ore.); *United States* v. *Kessler,* 104 F. Supp. 434 (E. D. Pa.); *United States* v. *Brass,* 37 F. Supp. 698 (E. D. N. Y.); *United States* v. *Mancini,* 29 F. Supp. 44 (M. D. Pa).

2. Since the findings of fraud are fully supported, there will be no occasion in this case to reach the issues raised by petitioner as to the finding that the decree was also subject to cancellation for illegality in that petitioner had not in fact been a person of good moral character during the two years preceding naturalization (R. 14-16). It may be noted, however, that in *United States* v. *Ness,* 245 U.S. 319, this Court held that a certificate of naturalization could be set aside as illegally entered, even though the government had entered an appearance and raised the very objection later presented as grounds for denaturalization. It held that Sections 11 and 15 of the Act of June 29, 1906 (34 Stat. 596) which are embodied in 8 U.S.C. 734(d) and 738(a), "were designed to afford cumulative protection against fraudulent or illegal naturalization" (245 U.S. at 327). See also *Maney* v. *United States,* 278 U.S. 17; *Baumgartner* v. *United States,* 322 U.S. 665, 675. In arguing that the decree of naturalization is *res judicata* on the issue of good moral character, petitioner relies on cases in which the denaturalization courts have refused to relitigate a question which had actually been in issue before and determined by the naturalization court. *United States* v. *Pandit,* 15 F. 2d 285 (C.A. 9); *United States* v. *Bischof,* 48 F. 2d 538 (C.A. 2). That is not the situation here, for neither petitioner's concealment of his prior convictions

nor his subsequent conviction for an offense in the prenaturalization period—the facts on which the finding that he was not in fact a person of good moral character rests[4]—were before or determined by the naturalization court. Lower federal courts, on numerous occasions, have cancelled certificates of naturalization on the ground that after-discovered evidence showed that the person involved had not been a person of good moral character for the requisite period. See, e.g., *United States* v. *Cloutier,* 87 F. Supp. 848 (E. D. Mich.); *United States* v. *Murray,* 48 F. Supp. 920 (E. D. Ark.); *United States* v. *Brass,* 37 F. Supp. 698 (E. D. N.Y.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1954.

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[4] Petitioner's plea of guilty and conviction in 1951 of conspiring to operate an unregistered still during the period terminating just three weeks prior to his naturalization establishes conclusively that he was not a person of good moral character for two years prior thereto. See *United States* v. *Cloutier,* 87 F. Supp. 848 (E.D. Mich.); *United States* v. *Jakini,* 69 F. Supp. 707 (W.D. Pa.); *United States* v. *Murray,* 48 F. Supp. 920 (E.D. Ark.). As the District Court noted, petitioner can not in this proceeding be heard to deny his guilt of that offense (R. 15). See *Local 167* v. *United States,* 291 U. S. 293; *Emich Motors* v. *General Motors,* 340 U.S. 558.

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